

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
JOSEPH W. BOLLINGER AND)	File No. BPH-950724MD
DONNA M. BOLLINGER)	
)	
For Construction Permit for Channel 258C3,)	
Bismarck, Missouri)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2002

Released: August 7, 2002

By the Commission:

1. The Commission has before it an Application for Review filed by David L. Shepherd (“Shepherd”) on December 10, 2001. Shepherd requests review of a November 13, 2001, staff decision by the Chief, Audio Services Division, Mass Media Bureau (“*Staff Decision II*”),¹ which dismissed Shepherd’s Petition for Reconsideration of the Commission’s decision in *Joseph W. Bollinger and Donna M. Bollinger*, 16 FCC Rcd 18107 (2001) (“*October 2001 MO&O*”). The *October 2001 MO&O* denied Shepherd’s Application for Review of a February 17, 2000, staff decision by the Chief, Audio Services Division, Mass Media Bureau (“*Staff Decision I*”), which partially granted and partially denied Shepherd’s Petition to Deny an application for a construction permit for a new FM station to operate on Channel 258C3, Bismarck, Missouri, filed by Joseph W. Bollinger and Donna M. Bollinger (“*Bollingers*”).² We find no error in *Staff Decision II* and, therefore, deny the Application for Review.

I. Background

2. The Bollingers were the winning bidder in Closed Broadcast Auction 25, MX Group FM 68.³ *Staff Decision I* partially granted and partially denied Shepherd’s Petition to Deny the Bollingers’ application for a construction permit for Channel 258C3, Bismarck, Missouri (“*Bismarck Application*”).⁴

¹ See *Letter to Law Office of Lauren A. Colby*, Ref. No. 1800B3-JAM (Chief, Audio Services Division, Mass Media Bureau, Nov. 13, 2001).

² File No. BPH-950724MD. See *Letter to Law Office of Lauren A. Colby, et. al.*, Ref. No. 1800B3-JAM (Chief, Audio Services Division, Mass Media Bureau, Feb. 17, 2000).

³ See *Public Notice, Closed Broadcast Auction No. 25 Closes*, 14 FCC Rcd 17186 (1999).

⁴ *Staff Decision I* determined that the Bollingers were not eligible for a bidding credit claimed but that there was no substantial and material question of fact regarding whether the Bollingers intended to deceive the Commission when they claimed the bidding credit, that there were no other substantial and material questions of fact which required further inquiry, and that the Bollingers were qualified to be a Commission licensee.

Shepherd filed an Application for Review of *Staff Decision I*, which the Commission denied in the *October 2001 MO&O*. Shepherd then filed a Petition for Reconsideration of the *October 2001 MO&O*. In *Staff Decision II*, the Audio Services Division dismissed that Petition for Reconsideration as repetitious pursuant to 47 C.F.R. § 1.106(b)(3). Shepherd now contends that the action taken in *Staff Decision II* was erroneous because the staff had no authority under 47 U.S.C. § 405(a) to act on petitions directed to the full Commission that pertain to actions taken by the full Commission.

II. Discussion

3. We find that Shepherd's arguments were thoroughly considered and properly resolved by the staff and we uphold *Staff Decision II*. Section 1.106(b)(3) of the Commission's rules states that a Petition for Reconsideration of an order denying an Application for Review that fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.⁵ Because Shepherd's Petition for Reconsideration did not rely on new facts or changed circumstances, the staff was within the scope of its delegated authority to dismiss as repetitious Shepherd's Petition for Reconsideration of the *October 2001 MO&O*. Shepherd states that he disagrees with the Staff's characterization of his Petition for Reconsideration as repetitious; however, he fails to identify any new facts or changed circumstances that were not before the Commission in the *October 2001 MO&O*.⁶ We find that the staff properly dismissed Shepherd's Petition for Reconsideration as repetitious. Therefore, Shepherd's argument that he was denied Commission review of his Petition for Reconsideration, in violation of Section 405 of the Act, is moot.⁷

4. Contrary to Shepherd's assertions, the staff's dismissal of his Petition for Reconsideration pursuant to 47 C.F.R. § 1.106(b)(3) does not diminish in any way Shepherd's right to seek judicial review. A Petition for Reconsideration of a Commission decision denying an Application for Review will suspend the running of the period within which judicial appeal may be taken. This period begins to run anew from the date on which final action is taken on the petition.⁸ There is no exception to this rule for cases in which a Petition for Reconsideration ultimately is dismissed as repetitious pursuant to 47 C.F.R. § 1.106(b)(3).⁹ Following such a dismissal, the United States Court of Appeals for the District of Columbia will routinely accept an appeal of the underlying Order pursuant to Section 402(b) of the

⁵ 47 C.F.R. § 1.106(b)(3).

⁶ See Application for Review at 4.

⁷ Shepherd also asserts that Section 1.106(b)(3) of the Commission's rules directly conflicts with the review procedures set forth in 47 U.S.C. § 155(c)(4) and (7) which state that any person aggrieved by the action of the delegated authority may file an Application for Review by the Commission and that the filing of such an Application for Review shall be a condition precedent to judicial review of actions taken by delegated authority. However, he fails to state why he believes that 47 C.F.R. § 1.106(b)(3), which governs repetitious petitions for reconsiderations, conflicts with these provisions of the Act. We find no conflict between Section 1.106(b)(3) of our rules and 47 U.S.C. § 155(c)(4) and (7).

⁸ See, e.g., *Southwestern Bell Telephone Company, et al. v. FCC*, 116 F.3d 593, 596-97 (D.C. Cir. 1997) (citing *Los Angeles SMSA Ltd. Partnership v. FCC*, 70 F.3d 1358, 1359 (D.C. Cir. 1995)). Thus, we reject as without merit Shepherd's claim that the issue whether an appeal can be taken from a staff decision issued pursuant to 47 C.F.R. § 1.106(b)(3) is novel.

⁹ See *Southwestern Bell Telephone Company, et al. v. FCC*, 116 F.3d at 597.

Communications Act of 1934, as amended.¹⁰ In accordance with these judicially approved procedures, Shepherd may now seek judicial review of the *October 2001 MO&O*.¹¹

III. Conclusion

5. Accordingly, IT IS ORDERED that the Application for Review filed December 10, 2001, by David L. Shepherd IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁰ See *Southwestern Bell Telephone Company, et al. v. FCC*, 116 F.3d at 596-97 (petitioners may seek Court review of underlying Order when petition for reconsideration of Commission action is dismissed as repetitious.).

¹¹ We note that Shepherd reported that it would be unnecessary to seek judicial review if the Bollingers did not timely make their final payment. The Bollingers timely paid the remaining balance of their winning bid and, on January 3, 2002, the staff issued the Bollingers a construction permit for a FM broadcast station on Channel 258C3 at Bismarck, Missouri, and dismissed Shepherd's mutually exclusive application.